

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

KATHLEEN SULLIVAN  
(Claimant)

PRECEDENT  
BENEFIT DECISION  
No. P-B-483  
Case No. 94-15607

S.S.A. NO. :

RLP COMPANY  
(Employer)

**SEP 24 1996**

EMPLOYER ACCOUNT NO.

EMPLOYMENT DEVELOPMENT DEPARTMENT

OFFICE OF APPEALS NO. SD-34365-0001

The Employment Development Department (EDD) appealed from the decision of the administrative law judge which held that the claimant was not disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code, that the claimant was disqualified for benefits under code section 1256.5, and that the employer's account was relieved of charges under code sections 1030 and 1032.

STATEMENT OF FACTS

The employer appealed from EDD's notice of determination and ruling which held that the employer's account was subject to charges on the ground that the claimant had left the subject employment with good cause and therefore was not disqualified for benefits under code section 1256. A notice of hearing before an administrative law judge was issued listing the issues to be covered at the hearing as the claimant's qualification for benefits under code section 1256, and the chargeability of the employer's account under code section 1030.

The employer and the claimant appeared at the hearing but EDD did not. The employer and the claimant essentially agreed to the following facts. The claimant is a recovering alcoholic. In April of 1993, the employer went to the claimant's home because

the claimant had not reported to work for several days. On that occasion, the employer found the claimant at her home in an intoxicated condition. The employer convinced the claimant to enter an alcohol treatment facility. The claimant did so and completed a three-day program at that facility. In early July of 1993, the claimant again failed to report to work and was again found at her home in a state of extreme intoxication. On that occasion, the representative of the employer who found the claimant called 9-1-1 and the claimant was transported to a hospital for treatment. The claimant was demoted from her position of office manager, but she was allowed to return to work in a lesser position.

The employer and the claimant differ in how they characterize the claimant's separation from employment. The claimant contends that she quit because she feared that the stressful working conditions at the employer's business would cause her to resume drinking. The employer contends that following August 28, 1993, the claimant was again absent from work for several days, whereupon the employer investigated and again found the claimant in her apartment in a state of intoxication. At that time, the employer's owner asserts that he told the claimant that she would be discharged if she did not report to work on Monday, September 6, 1993, ready to perform her job. According to the employer's owner, the claimant failed to report to work on that day and she was discharged.

The administrative law judge concluded that the employer's description of events represented the more credible version. The administrative law judge therefore treated the separation from employment as a discharge. However, it became apparent to the administrative law judge during the proceeding that the claimant's separation from employment might have resulted from an irresistible compulsion to consume intoxicants, regardless of whether that separation was deemed a discharge or a voluntary leave. Consequently, the administrative law judge announced on the record of the hearing that the case should be decided under code section 1256.5.

After summarizing the main aspects of code section 1256.5, the administrative law judge stated that he could not deal with that provision unless the parties then present were willing to waive notice of that issue since the issue had not been listed on the notice of hearing. Both the employer and the claimant then waived their rights to such notice and the hearing continued.

The record, however, does not indicate that the administrative law judge contacted EDD for the purpose of obtaining a waiver of EDD's right to notice of the issue under code section 1256.5. The record is also devoid of any indication that EDD ever authorized such a waiver.

#### REASONS FOR DECISION

We cannot concur with the results reached in this case. The administrative law judge's adjudication of this matter failed to comply with the procedural requirements set forth in section 5037, Title 22, Code of Regulations and the directives promulgated in Precedent Decision P-B-445. Precedent Decision P-B-445 was issued on May 6, 1986. However, we have been concerned with certain aspects of Precedent Decision P-B-445. This case has provided us with the opportunity to address those concerns.

Section 134 of the Unemployment Insurance Code (UIC) specifies that, except as otherwise provided, the term "Director" means "Director of the Employment Development Department."

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work.

Sections 1030 and 1032 of the Unemployment Insurance Code provide that the employer's reserve account shall be relieved of benefit charges if the claimant was discharged for misconduct.

Citing Maywood Glass Co. v. Stewart (1959), 170 Cal. App. 2d 719, the California Unemployment Insurance Appeals Board in Precedent Decision P-B-3 defined "misconduct connected with the work" as a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer.

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance as the result of inability or incapacity, isolated instances of ordinary negligence or

inadvertence, or good faith errors in judgment or discretion are not misconduct.

In Jacobs v. California Unemployment Insurance Appeals Board (1972) 25 Cal. App. 3d 1035, the Court of Appeal held that if a discharge is prompted by intoxication-induced behavior which is the product of an irresistible compulsion to drink, the claimant cannot be disqualified, as the test for misconduct is "essentially volitional." The Jacobs decision had a significant impact upon adjudications of unemployment insurance eligibility.

As a consequence of that impact, the legislature enacted code section 1256.5.

Code section 1256.5 provides as follows:

"(a) An individual is disqualified for unemployment compensation benefits if either of the following occur:

(1) The director finds that he or she was discharged from his or her most recent work for chronic absenteeism due to intoxication or reporting to work while intoxicated or using intoxicants on the job, or gross neglect of duty while intoxicated, when any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.

(2) He or she otherwise left his or her most recent employment for reasons caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.

(b) An individual disqualified under this section, under a determination transmitted to him or her by the department, is ineligible to receive unemployment compensation benefits under this part for the week in which the separation occurs, and continuing until he or she has performed service in bona fide employment for which remuneration is received equal to or in excess of five times his or her weekly benefit amount, or until a physician or authorized treatment program administrator certifies that the individual has entered into and is continuing in, or has completed, a treatment program for his or her condition and is able to return to employment.

(c) The department shall advise each individual disqualified under this section of the benefits available under Part 2 (commencing with Section 2601), and, if assistance in locating an appropriate treatment program is requested, refer the individual to the appropriate county drug or alcohol program administrator."

Code section 1032 was amended in 1987 to provide that if it is shown that the claimant's discharge or quit from his or her most recent employer was the result of an irresistible compulsion to use or consume intoxicants including alcoholic beverages, benefits paid to the claimant following that termination of employment, which are based upon wages earned from the employer prior to the date of termination of employment, shall not be charged to the account of the employer.

Regardless of whether this claimant's separation from employment is categorized as a discharge or a voluntary leaving, it would certainly seem that her separation from that employment might be attributable to an irresistible compulsion to consume intoxicants. Moreover, since having an irresistible compulsion to consume intoxicants is a disqualifying condition under code section 1256.5 but is not a disqualifying condition under code 1256 pursuant to the Jacobs decision, we can understand how the administrative law judge was tempted to incorporate the code section 1256.5 issue into this case. Nevertheless, it was beyond the administrative law judge's authority to do so for the following procedural and jurisdictional reasons.

First, as a matter of procedure, the administrative law judge failed to obtain a waiver of notice concerning the code section 1256.5 issue from each of the parties in this case. Code sections 1328 and 1030(c) specify, in pertinent part, that "the Director," and thus EDD, shall be an interested party to any appeal. Section 5029, Title 22, Code of Regulations, provides as follows:

"Unless otherwise provided by the code, written notice of the time and place of hearing an appeal shall be mailed to each party at least ten (10) days before the date of the hearing; and written notice of the time and place of hearing any tax petition shall be mailed at least twenty (20) days before the date of hearing. The time of notice may be

shortened with the consent of the parties. Any party may waive notice."

Section 5037, Title 22, Code of Regulations, provides, in pertinent part, as follows:

"In an appeal, the administrative law judge shall consider only those issues in a determination which are appealed or are noticed by the Office of Appeals. If there is a related issue arising directly from the determination, the administrative law judge shall inform the parties of his or her intention to consider the related issue and of their right to request a continuance as to said issue. If it appears that the rights of any party will be prejudiced by the consideration of a related issue, a continuance shall be ordered. Evidence shall not be taken on a related issue, nor a decision issued thereon, unless a knowing and informed waiver is obtained from all parties (emphasis added)."

The administrative law judge neglected to seek a waiver from EDD of EDD's right to receive notice of the issue under code section 1256.5. Although EDD was not represented at the hearing, EDD might have been telephoned or otherwise contacted during the proceeding with regard to this development. Since the code section 1256.5 issue was not listed on the notice of hearing, we do not believe that EDD's failure to appear at the hearing can be treated as a forfeiture of EDD's right to address that issue. The administrative law judge's failure to thus obtain a "knowing and informed" waiver from "all" the parties, as required by regulation section 5037, deprived the administrative law judge of authority to address the code section 1256.5 issue.

Second, as a matter of jurisdiction, Precedent Decision P-B-445 precluded the inclusion of that issue in this case even if all the parties to this case had waived notice of the code section 1256.5 issue. In Precedent Decision P-B-445, the Appeals Board observed that an administrative law judge handling a case arising under code sections 1256 and 1030-1032 could not address an issue arising under code section 1256.5 unless the 1256.5 issue had either been listed on the notice of hearing or the parties had waived their rights to notice on that issue. However, that decision very significantly went on to state:

"Furthermore, only the director may issue a determination under section 1256.5. The administrative law judge on his or her own cannot decide that matter."

In accordance with this pronouncement, Precedent Decision P-B-445 proceeded to affirm those portions of the administrative law judge's decision which held that the claimant was not disqualified for benefits under code section 1256 pursuant to Jacobs and that the employer's account was not relieved of benefit charges. However, Precedent Decision P-B-445 referred to EDD the related issue of the claimant's qualification for benefits under code section 1256.5.

As a result of the aforementioned language and the separation of the code section 1256 and 1256.5 issues in its holding, Precedent Decision P-B-445 has been interpreted as announcing a policy that, first, precludes administrative law judges from utilizing regulation section 5037 to include and address code section 1256.5 issues that arise in the context of proceedings that commenced with issues under code section 1256, or vice versa, and, second, directs that these issues be decided separately. As a result of this policy, "irresistible compulsion" issues that arise under these code sections are decided by different entities and at different times, despite the fact that the factual question involved under each provision is essentially the same.

In addition, Precedent Decision P-B-445 held that the employer's account was not relieved of charges notwithstanding the fact that the claimant was held not disqualified for benefits under code section 1256 and Jacobs. Due to the 1987 legislative amendment, however, effective January 1, 1988, employers' accounts were relieved of charges in cases where the separation from employment was attributable to an irresistible compulsion on the part of the claimant to use or consume intoxicants.

Having now witnessed the effects of Precedent Decision P-B-445 in numerous proceedings similar to the present case, we are of the opinion that the directives of that decision require revision. We have come to this conclusion for the following reasons.

First, Precedent Decision P-B-445 requires that issues that are factually and legally intertwined be artificially separated and decided at different times by different authorities. We think such a policy thwarts the general objective of having all closely related issues involving the same parties simultaneously decided in a comprehensive fashion by the same adjudicator. In fact, subsequent to the issuance of P-B-445 bewilderingly divergent decisions have occasionally issued concerning the same individual. We do not consider such conflicting adjudications concerning virtually the same facts and the same individual to represent a salutary functioning of the unemployment insurance program. We therefore conclude that all parties are more likely to receive a consistent and comprehensive result if these issues are concurrently decided by the same authority.

Second, the type of bifurcated adjudication system authorized by Precedent Decision P-B-445 on these essentially identical issues represents an unnecessary duplication of time, effort and expense. Fiscal constraints require that we identify and implement more efficient and economical methods of operation.

Third, we believe that the portion of the holding in Precedent Decision P-B-445, which dealt with the chargeability of the employer's account, ceased to represent an accurate reflection of the law when the amendment to code section 1032 took effect. As amended, code section 1032 provides that if the claimant's separation from employment was the result of an irresistible compulsion to use or consume intoxicants including alcoholic beverages, the employer's reserve account shall be relieved of benefit charges. Code section 1032, however, does not require that this decision take place under code section 1256.5 rather than code section 1256. Accordingly, we believe that an employer's account is entitled to be relieved of charges in any instance wherein it is held that the claimant became separated from employment due to an irresistible compulsion to use or consume intoxicants. The employer's account should be relieved of charges regardless of whether that conclusion is reached under code section 1256 as construed by the Jacobs decision, or under code section 1256.5, provided the benefits are based upon wages earned from the employer prior to the separation from employment. Fortunately, we think that our revision of Precedent Decision P-B-445 hereinafter described renders this third point essentially moot since the code section 1256 and 1256.5 issues will now be decided concurrently.



Having identified our dissatisfactions with Precedent Decision P-B-445, we have decided that the following, revised policy shall govern these situations.

First, the initial jurisdictional precept set forth in Precedent Decision P-B-445 remains unchanged. Administrative law judges shall not adjudicate code section 1256.5 issues in proceedings commenced under code sections 1256, 1030 and 1032, unless the issue under code section 1256.5 was specifically addressed in the appealed determination and that issue was either listed on the notice of hearing or all parties, including EDD, waive notice of that issue. If the related issue was not specifically addressed in the appealed determination, the administrative law judge may not address it even if all parties waive notice of that issue. This principle also applies to the reverse situation where it appears that an issue under code section 1256 should be adjudicated even though the case commenced with issues under code sections 1256.5, 1030 and 1032.

Second, once an administrative law judge presiding over a case commenced under either code section 1256 or code section 1256.5 decides that the case involves a related issue under either code section 1256 or code section 1256.5 that was not specifically addressed in the appealed determination, the administrative law judge shall set aside the existing determination and/or ruling and refer both issues, together, to EDD for further investigation and action. In this respect, we depart from the bifurcated adjudication process sanctioned by Precedent Decision P-B-445, and provide that these related issues be concurrently and consistently determined by EDD. Administrative law judges shall ensure that such referrals occur only in cases wherein ample evidence exists to support the conclusion that the related issue should be decided. Administrative law judges shall not, however, make a definitive finding on the question of whether an irresistible compulsion to use or consume intoxicants exists.

Third, if it is decided that a claimant became separated from his or her most recent employment as a result of an irresistible compulsion to use or consume intoxicants, benefits paid to the claimant and based upon wages earned from the employer prior to such separation shall not be charged to the account of the employer, regardless of whether the decision in question is reached under code section 1256 or code section 1256.5.

Precedent Decision P-B-445 is specifically overruled and superseded by this decision.

DECISION

The administrative law judge's decision and EDD's notice of determination and ruling are both set aside. The issues of the claimant's qualification for benefits under code sections 1256 and 1256.5 and the issue of the chargeability of the employer's account under code sections 1030 and 1032 are referred to EDD for further investigation and the issuance of concurrent and consistent determinations.

Sacramento, California, September 24, 1996

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